Supreme Court, U.S.
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No. 86-1894

In the Supreme Court of the United States

October Term, 1986

DONALD A. BARTON,

Petitioner,

v.

E. F. HUTTON & CO., INC.; KURT FESHBACH; STOCKBRIDGE PARTNERS, INC.; RICHARD JACOBY; HAIM PEKELIS; SHEARSON-AMERICAN EXPRESS, INC.; GOLDMAN SACHS & CO.; and DONALDSON, LUFKIN & JENRETTE SECURITIES CORP.,

Respondents.

REPLY BRIEF OF PETITIONER DONALD A. BARTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Donald A. Barton, hereby replies to the joint and consolidated brief of respondents in opposition to his petition for writ of certiorari as follows:

I.

The Respondents' Speculation and Conjecture in their Opposition Brief, Regarding the Plaintiffs' Motivations for Filing the Complaint, Lack Any Support in the Record, and Should be Disregarded by this Court.

In their opposition brief, the respondents have made "factual" contentions regarding the plaintiffs' purpose and motivation for filing the complaint which are not only devoid of any support in the record, but utterly irrelevant to any discussion of the issues presented in the petitions for writ of certiorari filed by Mr. Barton and Mr. Alioto. Accordingly, petitioner is compelled to alert this court to some of the unsupported factual statements made by the respondents.

In their brief, the respondents assert that the rise in Unioil's publicly trade stock in 1983 was "fueled by a series of optimistic public announcements by the company." [Respondents brief ("R.B.") at p. 3.] Respondents further claim that Unioil's issuance of a press release prior to filing the complaint in this action "appears to have been an effort to forestall" the "highly likely" shareholder class action suits against Unioil which were later filed. [R.B. at pp. 3-4.] These statements are mere speculation and conjecture, without any support whatsoever in the record.[1] The respondents made these

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[1] Respondents also refer to the sanctions awarded by the magistrate when he ordered the deposition of Mark Zelezny to resume. The Ninth Circuit did not mention the sanctions in its opinion, and those sanctions were never an issue in the proceedings below. Those sanctions were assessed for conduct separate from that which is the subject of this petition. It is clear that respondents' reference to those sanctions is gratuitous and presented to distract this court from the real issues before it.

unfounded assertions before, and they were disregarded by the District Court and the Ninth Circuit. Even though these contentions have no relation to the issues as framed in the opinion below and petitions for writ of certiorari, the respondents have raised them again, apparently for no other purpose than for *ad hominem* argument.

II.

Respondents Have Completely Failed to Address the Legal Prejudice Suffered by Mr. Barton When the Ninth Circuit Held that the Reimbursement Award Was Not Appealable.

In their brief, respondents simply brush aside the clear legal prejudice suffered by Mr. Barton as a result of the Ninth Circuit's decision that the reimbursement award was not appealable. As explained in Mr. Barton's petition for writ of certiorari, the Rule 11 sanctions award was inextricably intertwined with the reimbursement award under Rule 41(a)(2) of the *Federal Rules of Civil Procedure*. When the Ninth Circuit affirmed the sanctions award, it also passed judgment on the amount of and the appropriateness of the reimbursement award, which comprised $165,774.84 of the total award of sanctions against the Alioto firm.

Respondents mischaracterized Mr. Barton's argument about the legal prejudice suffered by Mr. Barton in this case. They contended that legal prejudice does not arise from the condition requiring payment of defendants' fees. Mr. Barton's assertion of legal prejudice is founded on his denial of review from the District Court's reimbursement award. Any question of whether the reimbursement amount in that order was patently unreasonable or related to work which was "rendered useless" is an issue for an appeal from the merits of the reimbursement award by Mr. Barton and the

plaintiffs, a review which they have been effectively denied by the Ninth Circuit. Respondents are simply unresponsive to the real issue of legal prejudice presented to this court, the denial of any opportunity for Mr. Barton to be heard.

Respondents contend that the plaintiffs and Mr. Barton had several "options" available to them, citing *Lau v. Glendora Unified School District*, 792 F.2d 929, 930-931 (9th Cir. 1986), and *Yoffe v. Keller Industries, Inc.*, 580 F.2d 126, 131 at fn. 13, *rehearing denied*, 582 F.2d 982, 983 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979). These "options" are chimerical. The plaintiffs could not withdraw the motion and pursue their class action claims in light of the District Court's ruling on the inappropriateness of the class. To require the plaintiffs to make a motion for dismissal without prejudice, and take a dismissal with prejudice in order to appeal, is too harsh a rule to apply in every case. The supposed "acquiescence" which the respondents assert took place when the plaintiffs failed to withdraw the motion for voluntary dismissal was not an "acquiescence" at all, because the plaintiffs immediately filed a notice of appeal from the reimbursement award.

All of the arguments presented by respondents dematerialize under scrutiny. The supposed "options" recited by the respondents apply only to the plaintiffs in the action. An attorney, like Mr. Barton, who is also subject to a Rule 41(a)(2) reimbursement order, cannot make an independent decision regarding these supposed "options." That decision belongs only to the party plaintiff which retains the attorney. In this case, Mr. Barton is no longer representing the plaintiffs at all. The respondents and the Court of Appeals were fully aware that Mr. Barton had ceased representing Heck

& Heck, Inc., Heck Oil, Inc., and Mark Zelezny by the time that the notice of appeal to the Ninth Circuit was filed. Thus, any discussion about various options available under *Lau* has no application to Mr. Barton. He, personally, had no options to exercise other than an appeal. For all intents and purposes, the judgment was final as to him.

The Ninth Circuit has held that an appeal by Mr. Barton concurrent with the appeal from the Rule 11 sanctions is premature. When it ruled on the sanctions appeal, however, the court affirmed both the propriety and the amount of the reimbursement award, and set forth the law of the case, rendering moot any later appeal by Mr. Barton. In creating this "Catch-22,"[2] the Ninth Circuit deafened the ears of the courts to Mr. Barton's pleas for a meaningful review of the reimbursement award.

As set forth in Mr. Barton's petition for review, mandamus is a completely inadequate and inappropriate remedy. If mandamus is denied, a party or an attorney in Mr. Barton's position would have their rights conclusively determined in their absence. If mandamus is granted to those affected by a reimbursement order which is intertwined with a Rule 11 sanction, then those named in the Rule 11 sanctions would be prejudiced. A mandamus proceeding typically proceeds more quickly than an appeal, and those appealing from the award of sanctions could have no standing to take part in the mandamus proceeding. The sanctions award

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[2]See *Helstowski v. Meanor*, 442 U.S. 500, 509 (1979) (Brennan, J., dissenting); *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 876 (D.C. Cir. 1984) (Greene, D.J., concurring); *Holt v. Pitts*, 619 F.2d 558, 562 (6th Cir. 1984).

would be considered final as to them, and thus not appropriate for mandamus, according to the Ninth Circuit's opinion in this case. Only a holding by this court, that all those effected by hybrid awards can appeal at the same time, would prevent such anomalies.

III.

Conclusion.

Legal prejudice is inherent in a hybrid Rule 11 and Rule 41(a)(2) order which permits appeal by some, but not all, of those affected by it, where the appeal will necessarily determine the rights of all. This case presents this court with important questions about the limits of the use of Rule 11 sanctions. A novel application of Rule 11 by the District Court, coupled with the Ninth Circuit's holding that Mr. Barton could not appeal from the Rule 41(a)(2) reimbursement portion of the District Court's order, has denied him any meaningful review of the reimbursement award.

Since its amendment in 1983, Rule 11 has been the subject of more than 1,000 decisions, and is the cause of great concern in the federal bar. Joseph, *The Trouble with Rule 11*, 73 A.B.A. J. 87, 88-90 (August, 1987). As shown by the procedural history of the present case, Rule 11 sanctions are being granted in a wide variety of forms. Mr. Barton and the plaintiffs have been prejudiced by the Rule 11 sanctions award which is ostensibly aimed only at the Alioto firm. If injustice of this type is to be avoided in the future, this court must rule that orders presented in combination with Rule 11 sanctions can be appealed alongside them. For all the above reasons, petitioner Donald A. Barton respectfully requests that this court grant his petition for a writ of certiorari in this case.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 7, 1987, I served the within *Reply Brief of Petitioner Donald A. Barton in Support of Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 7, 1987, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)